



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**  
**IN RE: FELA ASBESTOS CASES** **CIVIL ACTION NO. 02-C-9500**

**THIS DOCUMENT APPLIES TO:**

**IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA**

DAVID A. COOPER,

Plaintiff,

v.

CC-30-2023-C-31  
Judge Kelly Dodispoti

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

**ORDER GRANTING NORFOLK SOUTHERN RAILWAY COMPANY'S  
MOTION TO JOIN IN EXISTING MASS LITIGATION**

Pending before the Court is *Defendant Norfolk Southern Railway Company's Motion to Join in Existing Mass Litigation* ("Motion") (Transaction ID 70555130). Pursuant to West Virginia Trial Court Rule 26.09, Defendant Norfolk Southern Railway Company ("NSRC") has moved the Court for an Order joining the above-captioned civil action pending in the Circuit Court of Mingo County, West Virginia, with *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, pending in the Circuit Court of Kanawha County, West Virginia. Having reviewed the Motion, Plaintiff's Response (Transaction ID 70802972), Defendant's Reply (Transaction ID 70844455) and for good and sufficient reasons appearing to the Court therefore, the Court finds, and rules as follows:

***Findings of Fact:***

1. This case is brought under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 *et seq.* ("FELA"). See ¶4, *Plaintiff's Complaint*, copy attached to NSRC's Motion as *Exhibit A*.
2. Plaintiff alleges he was "severely and permanently injured while repairing and replacing Defendant's railroad tracks and the track beds and was subjected to numerous repetitive

exposures and was exposed to ballast dust, grinding dust, silica, diesel exhaust, gas exhaust, solvents, herbicides, cadmium, fumes, and other toxic airborne matter which Plaintiff was exposed to, in whole or in part, due to the carelessness and negligence of Defendant.” ¶5, *Plaintiff’s Complaint, Exhibit A to NSRC’s Motion*.

3. Plaintiff further alleges he “was told that he has squamous-cell carcinoma, a cancer; which was caused in whole or in part to his railroad work with Defendant.” ¶6, *Plaintiff’s Complaint, Exhibit A to NSRC’s Motion*.

4. Plaintiff also alleges Defendant, among other things, “Failed to warn the Plaintiff of the dangers of toxic exposures...” and “Failed to provide Plaintiff with proper personal protective equipment...” ¶7(d) and ¶7(f), *Plaintiff’s Complaint, Exhibit A to NSRC’s Motion*.

5. Although not mentioning asbestos explicitly, Plaintiff generally alleges his cancer was the result of workplace exposures to “other toxic airborne matter” which implicates asbestos. Asbestos has been characterized as a “toxic substance.” *See, e.g., Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 440 (1997). Exposure to asbestos has been described as a “toxic exposure.” *See, e.g., Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 153 (2003). Asbestos-related litigation has been described as “toxic-tort litigation.” *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 599 (1997).

6. Plaintiff contends Defendant’s Motion should be denied because his Complaint does not allege he was exposed to asbestos, he has filed a motion to amend his Complaint and is not currently alleging asbestos caused or contributed to his cancer diagnosis and or death, and “the First Amended Complaint that he intends on filing does not allege asbestos had anything to do with Plaintiff’s cancer diagnosis and or death and Plaintiff dying of squamous cell carcinoma of the oropharynx.” ¶¶ 3, 5 and 9, *Plaintiff’s Response*.

7. Defendant argues that, although not mentioning asbestos explicitly, Plaintiff's Complaint alleges exposure to, among other things, "other toxic airborne matter" and his proposed Amended Complaint alleges Plaintiff was exposed to and inhaled, among other things, "harmful and hazardous chemicals, agents, fumes, particles and substances" "chemicals, dust, powders" and "other hazardous chemicals, compounds and agents." ¶¶ 2-4, Defendant's *Reply*.

***Conclusions of Law:***

1. Pursuant to West Virginia Trial Court Rule 26.08(b), "With the advice and consent of the Panel, the Presiding Judge is authorized to consolidate and/or transfer Mass Litigation or proceedings therein from one circuit to one or more other circuits to facilitate the Panel's case management and trial methodologies and to order the transfer of court files to the appropriate circuit."

2. By Administrative Order entered on April 29, 2009, the Supreme Court of Appeals of West Virginia referred ". . . all pending and subsequently filed cases in West Virginia asserting claims under FELA for personal injury and damages caused, in whole or in part, from exposure to asbestos and asbestos-containing materials" to the Mass Litigation Panel and transferred such cases to the Circuit Court of Kanawha County, West Virginia, for coordinated or consolidated resolution in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500.

3. Plaintiff's case qualifies as a lawsuit subject to the Supreme Court of West Virginia's 2009 Order and under the provisions of West Virginia Trial Court Rule 26.09 this case should be transferred and joined with *In re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, pending in the Circuit Court of Kanawha County, West Virginia.

4. Considering the foregoing, with the advice and consent of the Mass Litigation Panel, the Court **GRANTS** *Defendant Norfolk Southern Railway Company's Motion to Join in Existing Mass*

*Litigation* and **ORDERS** the above-captioned civil action transferred to the Circuit Court of Kanawha County, West Virginia, for coordinated or consolidated resolution in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500.

5. The above-captioned civil action is designated for electronic filing and service, as provided in West Virginia Trial Court Rule 15.01, *et seq.*, **effective September 28, 2023**. To facilitate electronic filing and service in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, pending in the Circuit Court of Kanawha County, West Virginia, the number for the above-captioned civil action shall hereinafter be 23-C-31 MNG FELA.

The Clerk of the Circuit Court of Kanawha County, West Virginia, is **ORDERED** to send a copy of this Order to the Clerk of the Circuit Court of Mingo County, West Virginia, for service on the Honorable Kelly Codispoti and all counsel of record in the above-captioned civil action. All counsel of record in *In Re: FELA Asbestos Cases*, Civil Action No. 02-C-9500, shall this day be electronically served with this Order via File & ServeXpress.

It is so **ORDERED**.

**ENTERED:** September 21, 2023.

/s/ Jay M. Hoke  
Presiding Judge  
FELA Asbestos Cases